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THE UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS CONFIRMS A SEPARATE PROPERTY STATUS FOR CULTURAL TREASURES

MARILYN E. PHELAN*

I. INTRODUCTION

In 1965, the United States Congress declared:

advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view to the future.¹

Therefore, Congress determined that it was necessary for the federal government to foster and support access to the arts and the humanities.² Acknowledging that the arts belong to all the people of the United States,³ Congress found that “[t]o fulfill its educational mission, achieve an orderly continuation of free society, and provide models of excellence to the American people, the Federal Government must transmit the achievement and values of civilization from the past via the present to the future.”⁴ As a result, Congress established the National Foundation on Arts and Humanities.

Congressional focus on transmitting the achievements and values of civilization from the past to the future follows the concept of a cultural heritage for all humanity. That concept evolved from ideals set out in the preambles to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict [hereinafter Hague Convention]⁵ and to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and

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1. 20 U.S.C. § 951(3) (1994) (establishing National Foundation on Arts and Humanities).

2. *See id.*

3. *See id.* § 951(1).

4. *Id.* § 951(11).

5. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention].

Transfer of Ownership of Cultural Property, adopted by the United Nations Educational, Scientific, and Cultural Organization in 1970 [hereinafter 1970 UNESCO Convention].⁶ Such a concept is also incorporated in the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects [hereinafter UNIDROIT Convention], which was completed in Rome in 1995.⁷

These conventions have stressed the immense importance of cultural property for the advancement of civilization. The 1954 Hague Convention was the first convention to consider the protection of cultural property during armed conflict. Its Preamble provides that damage to the cultural property of any people whatsoever damages the cultural heritage of all mankind.⁸ As the Preamble to the 1970 UNESCO Convention declares, cultural property is one of the basic elements of civilization and national culture, and its interchange is needed to increase the knowledge of civilization, enrich the cultural life of all peoples and inspire mutual respect and appreciation among nations.⁹ Similarly, parties to the recent UNIDROIT Convention recognized that protecting cultural heritage and cultural exchange is important in promoting an understanding between peoples as well as providing for the well being of humanity and the progress of civilization.¹⁰

The value attached to cultural property mandates acknowledgment of its significance and the need for protection of such property, both by law and by public awareness. This article will discuss a separate body of property law, which recognizes cultural property as a special category of property and seeks to mitigate the risk that cultural property may be wasted due to indifference, destruction, theft or illegal exportation. Additionally, this article will review the international conventions on the protection of cultural property, emphasizing the recent UNIDROIT Convention, as well as consider domestic law to determine the legislative and judicial means that exist to protect cultural treasures and, in some circumstances, to restore cultural property to countries of origin.

6. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Oct. 12 - Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

7. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

8. See Hague Convention, *supra* note 5, Preamble, 249 U.N.T.S. at 240.

9. 1970 UNESCO Convention, *supra* note 6, Preamble, 249 U.N.T.S. at 232.

10. UNIDROIT Convention, *supra* note 7, 34 I.L.M. at 1322.

II. INTERNATIONAL AGREEMENTS PROTECTING CULTURAL PROPERTY

Although concern for the protection of cultural property began to evolve in the mid-nineteenth century,¹¹ the first significant international legislation to protect cultural property was the 1954 Hague Convention.¹² The Hague Convention seeks to protect cultural property during wartime by prohibiting the destruction or seizure of cultural property during armed conflict.¹³ The Hague Convention applies whether the conflict is international or civil in nature.¹⁴ Additionally, the Hague Convention applies to peacetime international trafficking in cultural property seized unlawfully during an armed conflict.¹⁵

The second important international agreement, the 1970 UNESCO Convention,¹⁶ focuses on private conduct, primarily during peacetime. This international agreement arose out of concern in the 1960s regarding the importation into various countries of artifacts unlawfully obtained from their country of origin. The nations in attendance at the General Conference recognized that illicit trade in the cultural property of various nations had become a primary cause of the impoverishment of the cultural heritage of the originating countries.¹⁷ The General Conference concluded that international cooperation was one of the most efficient ways to protect each country's cultural property from the dangers that could result from the illicit transfer of such property.¹⁸ Therefore, parties

11. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986) [hereinafter *Two Ways*]. Francis Lieber, a German emigre professor at Columbia College in New York, argued for protection of cultural property during combat. See *id.* at 833. As Merryman points out, the Lieber Code was the first attempt to provide a set of principles governing the conduct of belligerents in enemy territory. See *id.*

12. Hague Convention, *supra* note 5, 249 U.N.T.S. at 240.

13. *Id.*

14. *Id.* art. 16, 249 U.N.T.S. at 252 (creating distinctive emblem [blue shield] to facilitate recognition during military conflict). The emblem repeated three times is used as a means of identification of immovable cultural property under special protection, the transport of cultural property and improvised refuges. See *id.* art. 17, 249 U.N.T.S. at 254. Transport exclusively engaged in the transfer of cultural property, whether within a territory or to another territory, may, at the request of a contracting party, take place under special protection. See *id.* art. 12, 249 U.N.T.S. at 250. Parties to the Convention must refrain from any act of hostility directed against transport. See *id.*

15. *Id.* art. 4, 249 U.N.T.S. at 244.

16. 1970 UNESCO Convention, *supra* note 6, 823 U.N.T.S. at 231.

17. See *id.*

18. See *id.* art. 2, 823 U.N.T.S. at 236. Artistic objects had been sold in increasing quantities from churches, museums and collections. See Act of Dec. 22, 1982, Pub. L. No. 97-446, 1982 U.S.C.A.N. (96 Stat. 2329) 4078, 4099-4100. The governments of the victimized nations became disturbed at the outflow of their arti-

to the convention agreed to oppose all illicit import, export, and transfer of ownership of cultural property, with whatever means at their disposal.¹⁹

Language in both the 1954 Hague Convention and the 1970 UNESCO Convention refers to a common heritage of humanity to which persons of every nationality should have free access.²⁰ Both conventions reflect a widespread concern that destruction, theft and the illicit import and export of cultural properties could obliterate this common heritage. However, one commentator suggested that the 1954 Hague Convention and the 1970 UNESCO Convention present conflicting theories of cultural property.²¹ Specifically, the Hague Convention regards cultural property as a component of a human culture, common to all peoples, whereas the UNESCO Convention envisions cultural property as a part of a national cultural heritage. Presumably, remedies provided by the conventions reflect the divergence of their philosophies.²²

Under the concept termed cultural internationalism, wealthy nations with a developed community of museums and collectors may obtain and retain cultural objects because such nations are in a better position to care for and preserve cultural property.²³ For

facts to foreign lands and organized the convention to combat the increasing illegal international trade in national artistic treasures, which in some countries had led to wholesale pillaging. *See id.* at 4100. To this end, parties to the convention undertook to protect their own cultural heritage and to establish an export certificate for cultural property designated by each country as being of importance. *See id.* at 4101. The parties further agreed to take whatever measures they could, consistent with existing national legislation, to prevent museums and similar institutions within their territory from acquiring cultural property originating in another country that had been illegally exported. *See* 1970 UNESCO Convention, *supra* note 6, art. 2, 823 U.N.T.S. at 236.

19. *See* Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 1982 U.S.C.A.N. (96 Stat.) 4098, 4098-4106 (implementing part of 1970 UNESCO Convention).

20. For a fundamental conception of international law governing a common heritage of cultural property, see generally SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE SURVEY* (1978); P. BATOR, *The International Trade in Art*, 34 STAN. L. REV. 275 (1982); John Henry Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U. J. INT'L L. & POL. 757 (1983); LYNDAL V. PROTT & P.J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE* (1984); John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985) [hereinafter *Elgin Marbles*]; Merryman, *Two Ways*, *supra* note 11, at 831; JOHN HENRY MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS AND THE VISUAL ARTS* (1987).

21. *See* Merryman, *Two Ways*, *supra* note 11, at 831.

22. *See id.*

23. *See id.* at 846.

these reasons, some contend the concept of cultural internationalism gives priority to the protection of cultural property.²⁴

The second concept, termed cultural nationalism, demands the repatriation of cultural property.²⁵ Cultural nationalism embraces the theory that all cultural property should remain in its country of origin.²⁶ Some contend that cultural nationalism does not ascribe to the preservation of cultural property, as it encourages the return of cultural property to underdeveloped countries, many of which do not have means to protect such property. Therefore, one commentator referred to cultural nationalism as "destructive retention" or "covetous neglect."²⁷ This commentator maintains that the 1970 UNESCO Convention recognizes nationalism exclusively and, in fact, stifles cultural internationalism.²⁸ With the exception of a statement in its Preamble setting out the benefits of the international interchange of cultural property, the 1970 UNESCO Convention provides unqualified support for retentive cultural nationalism.²⁹

The Convention for the Protection of the World Cultural and Natural Heritage, adopted by UNESCO in 1972 [hereinafter 1972 UNESCO Convention], embraces both philosophies.³⁰ This Convention addresses specifically the need for international protection of cultural property. The Convention was adopted to establish a permanent effective system to protect cultural and natural heri-

24. *See id.*

25. *See id.* at 832.

26. *See Merryman, Elgin Marbles, supra* note 20, at 1913. Merryman maintained that cultural property is "important to the cultural definition and expression [of a country], to shared identity and community." *Id.* It tells people who they are and where they came from. *See id.* In helping to preserve the identity of specific cultures, it can "help the world preserve texture and diversity." *Id.* According to Merryman, "a people deprived of its artifacts is culturally impoverished." *Id.* Still, Merryman theorized that a cultural heritage of all mankind permits, even encourages, an international distribution of artifacts of a particular culture. *See id.* at 1922. Thus, Merryman would not sanction removal of the Elgin Marbles from the British Museum and their return to Greece. *See id.* Merryman assumed that "values of cultural internationalism," which he categorized as preservation, integrity and distribution/access, led to the conclusion that the Marbles should remain where they are. *See id.* While Merryman conceded that the integrity argument would favor reuniting the Marbles with the Parthenon, Merryman was of the opinion that the return of the Marbles would expose them to unacceptable hazards. *See id.* at 1921.

27. Merryman, *Two Ways, supra* note 11, at 846.

28. *See id.* at 850.

29. *See id.*

30. Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151 [hereinafter 1972 UNESCO Convention].

tage.³¹ Thus, UNESCO provides for international protection of cultural property, not by permitting wealthier countries to obtain and retain cultural property, but rather by requiring rich nations to help developing countries of origin to preserve their cultural properties.³² Recognizing that an international heritage often remains incomplete at the national level,³³ the convention places the responsibility squarely upon the international community to provide collective assistance to individual countries to protect the universal value of their cultural properties.³⁴

The most recent international convention on the protection of cultural property, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, endorses almost exclusively the concept of cultural nationalism.³⁵ Parties to this convention assumed that retentive cultural nationalism provides for protection of cultural property. The Diplomatic Conference for the adoption of a UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects met in Rome in June of 1995 to improve the preservation and protection of cultural heritage in the interest of all.³⁶ Drafters of the UNIDROIT Convention recognized that problems regarding the preservation of cultural property remain due to the continuation of the illicit trade in cultural objects, the pillage of archaeological sites and the looting and destruction of cultural property during military combat.³⁷ The drafters consciously recognized the need for a process to enhance international cultural cooperation and to

31. *See id.*

32. *See* 1972 UNESCO Convention, *supra* note 30, 1037 U.N.T.S. at 154. Article 5 requires parties to the convention to "foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field." *Id.* art. 5, 1037 U.N.T.S. at 154. Article 6 notes that parties to the convention recognize that the cultural and natural heritage of outstanding universal value "constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate." *Id.* art. 6, 1037 U.N.T.S. at 154. Parties to the convention agree to give their help in the identification, protection, conservation and preservation of such heritage. *See id.* Article 7 affirms that "international protection of the world cultural and natural heritage" means the "international co-operation and assistance designed to support" individual nations "in their efforts to conserve and identify that heritage." *Id.* art. 7, 1037 U.N.T.S. at 155.

33. *See* 1972 UNESCO Convention, *supra* note 30, Preamble, 1037 U.N.T.S. at 152.

34. *See id.*

35. UNIDROIT Convention, *supra* note 7, 34 I.L.M. at 1322.

36. *See id.* at 1330.

37. *See id.*

provide and maintain a proper role for legal trading and inter-state agreements for cultural exchange.³⁸

The UNIDROIT Convention, completed on June 24, 1995, was signed by twenty-two countries.³⁹ It provides for the return of all stolen or illegally exported cultural property, albeit only from the effective date of the Convention in the country in which a claim is brought.⁴⁰ A claim for restitution of stolen or illegally exported cultural objects may be brought before the courts of the country in which the cultural object is located.⁴¹ Additionally, one country may request the court of another country to order the return of a cultural object illegally exported from the requesting country.⁴² The requesting country must establish that removal of the object from its territory significantly impaired the physical preservation of the object, its integrity, its traditional or ritual use by a tribal or indigenous community, or must establish the object is of significant cultural importance for the requesting country.⁴³ Once the requesting country establishes these facts, a court in which a claim is brought must order the return of an illegally exported cultural object.

Although the UNIDROIT Convention would provide the impetus for repatriation of cultural objects if adopted by a sufficient number of countries, its provisions only apply prospectively. Required restitution under the UNIDROIT Convention does not apply to cultural objects that were stolen before the UNIDROIT Convention was in force in a country in which a claim is brought,⁴⁴

38. *See id.*

39. UNIDROIT Convention, *supra* note 7, 34 I.L.M. at 1322 (Burkina Faso, Cambodia, Cote d'Ivoire, Croatia, France, Guinea, Hungary, Italy, Lithuania, Zambia, Georgia, Finland, Portugal, Paraguay, Switzerland, Romania, Pakistan, Netherlands, Peru, Bolivia, Senegal and Russian Federation). Article 11 provided that countries had until June 30, 1996 to sign the UNIDROIT Convention. *See id.* art. 11(1), 34 I.L.M. at 1355. Countries that have not signed the UNIDROIT Convention can accede to it. *See id.* art. 11(2), 34 I.L.M. at 1355. As of October, 1997, two countries (Lithuania and Paraguay) had ratified the UNIDROIT Convention and one (China) had acceded to it. Italy approved a draft bill for ratification and El Salvador indicated it would accede very soon. *See* Letter from Marian Schneider, Research Officer, UNIDROIT, Rome, Italy, to Marilyn E. Phelan, Robert H. Bean Professor of Law, Texas Tech University School of Law (on file with author).

40. *See* UNIDROIT Convention, *supra* note 7, art. 10(2), 34 I.L.M. at 1335.

41. *See id.* art. 8(1), 34 I.L.M. at 1334.

42. *See id.* art. 5(1), 34 I.L.M. at 1332.

43. *See id.* art. 5(3), 34 I.L.M. at 1333. Any request for return must be brought within a period of three years from the time when the requesting nation knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of export. *See id.* art. 5(5).

44. *Id.* art. 10(1), 34 I.L.M. at 1334.

nor to cultural objects that were illegally exported before the UNIDROIT Convention was in force in the requesting country, as well as the country in which the claim is brought.⁴⁵ The UNIDROIT Convention, however, provides that it does not in any way legitimize any illegal transaction that occurred before it was in force. Therefore, it does not limit the right of any country or person to make a claim under remedies available outside the framework of the UNIDROIT Convention for restitution or return of a cultural object stolen or illegally exported before the effective date of the UNIDROIT Convention.⁴⁶ Such alternative avenues for the restitution of stolen cultural objects are discussed below.⁴⁷

III. WHAT IS CULTURAL PROPERTY?

It is difficult to define "cultural property" comprehensively. While some properties leave little doubt as to their cultural significance, the cultural value of other property is not necessarily self-evident. A proper definition of cultural property is crucial to the effectiveness of any international agreement to preserve and protect such properties and, in some circumstances, to return cultural property to its country of origin.

One commentator has suggested that the delineation of cultural property in the 1970 UNESCO Convention produces a dual standard that a country must meet before it can assert an interest in property.⁴⁸ First, an object must be "cultural property" as defined in Article I of the 1970 UNESCO Convention.⁴⁹ Second, the object must be part of the cultural heritage of the country seeking to protect it.⁵⁰ Other commentators have characterized the entire question of defining cultural property for legal and policy purposes as

45. UNIDROIT Convention, *supra* note 7, art. 10(2), 34 I.L.M. at 1335.

46. *Id.* art. 10(3), 34 I.L.M. at 1335.

47. See, e.g., *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts*, 917 F.2d 278 (7th Cir. 1990); *Republic of Turkey v. OKS Partners*, 797 F. Supp. 64 (D. Mass. 1992); *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990); *Naftzger v. American Numismatic Soc'y*, 42 Cal. App. 4th 421 (1996); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991); *O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980); *Menzel v. List*, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966).

48. See John B. Gordon, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 HARV. INT'L L.J. 537 (1971).

49. 1970 UNESCO Convention, *supra* note 6, art. 1, 823 U.N.T.S. at 234 (delineating categories of property of which term "cultural property" will be designated).

50. See Gordon, *supra* note 48, at 542. Article 4 of the 1970 UNESCO Convention describes cultural property which forms part of the cultural heritage of a state. See *id.*

"large and unruly."⁵¹ Yet, these commentators recognize that some objects, such as works of art and archaeological and ethnological objects, certainly qualify.⁵²

Often, the legislation of nations with laws protecting their cultural property refers to protected cultural property as "monuments of cultural and historical value," "objects of artistic and historical interest," "ancient monuments," "national monuments," "historic monuments," "archaeological monuments and objects," and sometimes simply as "antiquities."⁵³ Such terminology alone, without definition, can prove troublesome to courts attempting to enforce the law.⁵⁴ For example, courts in the United States have encountered problems in enforcing provisions of the Antiquities Act of 1906.⁵⁵

51. Merryman, *Two Ways*, *supra* note 11, at 832.

52. *See id.* at 831. Merryman would include these objects in any definition because "museums acquire and display them, scholars study them, collectors collect them and dealers sell them. National laws and international conventions provide for their preservation and regulate trade in them. A strong international consensus supports their inclusion in any definition of cultural property." *Id.* at 832.

53. *See* Memorandum from UNESCO to Marilyn E. Phelan (on file with author). Decree-law No. 4874 of the Praesidium of the People's Assembly of September 23, 1971, Albania, protects "monuments of cultural value" or objects under the protection of the State. *Id.* Decree 81-84 of May 30, 1984, Law on the Protection of the Cultural Heritage of the Nation, Honduras, protects "monuments" and "sites." *Id.* The Act Concerning the Protection of Monuments of June 14, 1977, Liechtenstein, protects "monuments." *Id.* Law No. 167 on the Protection of Cultural Monuments of the Mongolian People's Republic sanctioned by edict of the Praesidium of the Great People's Khural of the MPR on October 12, 1970, protects "cultural monuments." *Id.* The Antiquities Act 1976, New Zealand, protects "antiquities." *Id.* The Act Concerning the Cultural Heritage, 1979, Norway, protects "all ancient and historic monuments." *Id.* The Antiquities Ordinance No. 9 of July 15, 1940, Sri Lanka, protects "antiquities," and the National Museums and Monuments of Zimbabwe Act, ch. 313 of 1972, protects "national monuments, ancient monuments and relics." *Id.*

54. Many nations do provide definitions of such terms. *See id.* For example, the Code for the Protection of Antiquities in Afghanistan 1958, states that "antiquities" includes all artistic relics and monuments erected before the reign of Emperor Ahmad Shah Baba (1748 A.D.). *Id.* The Bahrain Antiquities Ordinance 1970 defines an "antiquity" as any object which was constructed, shaped, inscribed, erected, excavated or otherwise produced or modified by human agency before 1780 A.D. *Id.* The Antiquities Act 1968-76, for Bangladesh, defines an "antiquity" as any ancient (more than 100 years old) product of human activity or any object declared by the Government to be an antiquity. *Id.* The Antiquities Law 1935, as amended 1964 and 1974, Cyprus, defines "antiquities" as objects produced, sculptured, inscribed or painted or generally made in Cyprus before 1850. *Id.* The Antiquities Proclamation No. 229 of 1966, for Ethiopia, defines an "antiquity" as any product of human activity, or any object of historical or archaeological interest, having its origin prior to 1850 A.D. *Id.*

55. *See* United States v. Smyer, 596 F.2d 939 (10th Cir. 1979); United States v. Diaz, 499 F.2d 113 (9th Cir. 1974).

The Antiquities Act of 1906 provides penalties for destroying or damaging any historic ruin, monument, or object of antiquity located on public lands in the United States.⁵⁶ Due to the lack of clarity in the definition of these terms, the Ninth Circuit Court of Appeals reversed the conviction of an individual under the Act due to vagueness in *United States v. Diaz*.⁵⁷ According to the court, a person must be able to know with reasonable certainty those objects he or she may not take.⁵⁸ The court noted that "antiquity" can refer not only to the age of an object but also to the use for which the object was made and to which it was put, facts that likely would not be commonly known.⁵⁹ Despite the Ninth Circuit's holding, the Tenth Circuit in *United States v. Smyer*⁶⁰ refused to declare the Antiquities Act unconstitutional with respect to the prosecution of an individual, who excavated a prehistoric Mimbres ruin at an archaeological site that was inhabited about A.D. 1000-1250.⁶¹ The Tenth Circuit stated that a person of ordinary intelligence should realize that one may not excavate a prehistoric Indian burial ground or appropriate artifacts that are 800-900 years old.⁶²

The Archaeological Resources Protection Act,⁶³ enacted by the U.S. Congress in 1979 to protect archaeological resources and sites located on public and Native American lands, specifically defines an "archaeological resource" as any material remains of past human life or activities that are of archaeological interest and that are at least 100 years of age.⁶⁴ This definition is directed to the age of the object.⁶⁵

Terminology that limits cultural property to historical properties fails to include modern art. In enacting the Visual Artists

56. See 16 U.S.C. § 433 (1994).

57. *Diaz*, 499 F.2d at 113. See also *Smyer*, 596 F.2d at 939 (holding Antiquities Act not unconstitutionally vague as applied in prosecution of defendants for taking artifacts from ancient sites).

58. See *Diaz*, 499 F.2d at 114.

59. See *id.* at 115.

60. *Smyer*, 596 F.2d at 939.

61. *Id.* at 940.

62. See *id.* at 941.

63. 16 U.S.C. §§ 470aa-470mm (1994).

64. *Id.* § 470bb(1).

65. See *id.* A problem might arise in determining the age of an artifact. Does one begin counting the 100 years from the effective date of the Act or from the year in which an artifact is taken illegally? Suppose an individual appropriates in 1997 an artifact that was created in 1896. If one counts from the effective date of the Act, 1979, the artifact is not at least 100 years of age. It would have had to have been created prior to 1879. On the other hand, if one counts from the year the artifact is taken, 1997, the artifact is at least 100 years in age.

Rights Act (VARA),⁶⁶ adopted in the United States in 1990,⁶⁷ Congress included art as a part of our cultural legacy.⁶⁸ In passing VARA, Congress hoped that the Act would prevent distortions of works that cheat the public of an accurate account of the culture of our time.⁶⁹ Therefore, Congress provided a legal right for contemporary visual artists to mitigate against destruction of such creations and to protect their historical legacy.⁷⁰

Cultural property also should include palaeontological objects. Although such resources do not have the cultural interest generally attached to archaeological remains and artifacts, fossils also are of immense importance in understanding the past. Fossil resources are in need of international protection.⁷¹ The 1970 UNESCO Convention and the 1995 UNIDROIT Convention provide international recognition that palaeontological objects are cultural property by including such property in the definition of cultural property.

The UNIDROIT Convention tracks the definition of cultural property set out in Article I of the 1970 UNESCO Convention.⁷² It defines cultural objects as those that, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to the Convention. The Annex to the UNIDROIT Convention defines cultural property to include the following eleven categories of properties:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

66. Visual Arts Rights Act of 1990, Pub. L. No. 101-650, 603(a), 104 Stat. 5128 (1990) (codified as amended at 17 U.S.C. § 101 (1990)).

67. 17 U.S.C. § 106A (1994).

68. See Judicial Improvements Act, Pub. L. No. 101-650, 1990 U.S.C.C.A.N. (104 Stat.) 6915, 6916 (1990).

69. See *id.*

70. See *id.* In the United States, the moral right of visual artists is effective only for the life of the artist. See *id.*

71. See David J. Lazerwitz, *Bones of Contention: The Regulation of Palaeontological Resources on the Federal Public Lands*, 69 IND. L.J. 601 (1994). Lazerwitz contends that the U.S. Congress must adopt a comprehensive statutory policy for the regulation of fossil resources to prevent their destruction or removal from the public domain. See *id.* He noted that the high-priced market for fossil resources makes it difficult for paleontologists to protect sites under excavation and forces them to compete with commercial dealers who often can outbid them for rights to excavate on sites on private lands. See *id.*

72. UNIDROIT Convention, *supra* note 7, art. 2, 34 I.L.M. at 1331.

- (b) Property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) Products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) Elements of artistic or historical monuments or archaeological sites that have been dismembered;
- (e) Antiquities more than 100 years old, such as inscriptions, coins and engraved seals;
- (f) Objects of ethnological interest;
- (g) Property of artistic interest, such as:
 - (i) Pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) Original works of statuary art and sculpture in any material;
 - (iii) Original engravings, prints and lithographs;
 - (iv) Original artistic assemblages and montages in any material;
- (h) Rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary) singly or in collections;
- (i) Postage, revenue and similar stamps, singly or in collections;
- (j) Archives, including sound, photographic and cinematographic archives; and
- (k) Articles of furniture more than 100 years old and old musical instruments.

One commentator criticized the 1970 UNESCO definition as a “maximalist solution,” which includes any object of any possible present or future cultural value.⁷³ An alternative would be to adopt a “minimalist solution,” which would restrict the definition of cultural property to objects of recognized high cultural value that have real importance for particular countries.⁷⁴ One commentator sup-

73. DETLEV CHRISTIAN DICKE, THE INSTRUMENTS AND THE AGENCIES OF THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY, IN PROCEEDINGS OF THE THIRTEENTH COLLOQUY ON EUROPEAN INTERNATIONAL LEGAL PROTECTION OF CULTURAL PROPERTY 17 (1983).

74. *See id.*

porting the minimalist solution suggested that each nation should prepare a list of cultural objects, classifying the property into the following categories: (1) objects with high universal importance; (2) objects forming part of the national cultural identity; (3) objects of supreme quality not forming part of the national cultural identity; (4) objects of high importance; (5) objects of importance; (6) objects of interest; and (7) objects of some cultural value.⁷⁵ The return of objects in the first two categories would be compulsory.⁷⁶ The commentators recommend that each country should immediately prepare a list of objects in the first two categories noted above and of objects in the third and fourth categories in public ownership in a later period. Thereafter, each country could attempt to make a list of objects in the third category that were in private ownership.⁷⁷

The 1954 Hague Convention more closely approximates the minimalist solution, as it defines cultural property to include movable and immovable property that has great importance for the cultural heritage of every people, including monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; and scientific collections and important collections of books or archives or of reproductions of the property defined above.⁷⁸

The 1972 UNESCO Convention provided another view by dividing cultural property into two categories, cultural heritage and natural heritage.⁷⁹ Cultural heritage includes monuments of outstanding historic, artistic or scientific value; groups of buildings of outstanding universal historical, artistic, or scientific value; and archaeological sites of outstanding universal historical, aesthetic, ethnological or anthropological value.⁸⁰ Natural heritage includes natural features of outstanding universal aesthetic or scientific value; geological and physiographical formations and areas that constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; and natural sites or areas of outstanding universal

75. *See id.* at 27.

76. *See id.*

77. *See id.*

78. Hague Convention, *supra* note 5, art. I, 249 U.N.T.S. at 242.

79. 1972 UNESCO Convention, *supra* note 30, arts. 1-2, 1037 U.N.T.S. at 153-54.

80. *See id.*, art. 1, 1037 U.N.T.S. at 153.

value from the point of view of science, conservation or natural beauty.⁸¹

The question of whether there should be a national inventory of cultural property is debatable. The primary disadvantage of such an inventory is the difficulty encountered in compiling it.⁸² One commentator contended that protection of cultural property should not be dependent on the inclusion of each item in a national inventory.⁸³ As an alternative, the commentator argued that a country simply should refuse to provide certification for any item it sought to prevent from leaving the country - a process he termed a "passport" (versus an "inventory") concept.⁸⁴

Regulations for the execution of the 1954 Hague Convention⁸⁵ require the preparation of an International Register of Cultural Property under Special Protection (Register).⁸⁶ The Register, which is maintained by the Director-General of UNESCO, is subdivided into three paragraphs, headed Refuges, Centres containing Monuments, and Other Immovable Cultural Property.⁸⁷ The 1972 UNESCO Convention establishes an Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, called the World Heritage Committee.⁸⁸ One of the duties of the World Heritage Committee is to publish a "World Heritage List." The list should be up-to-date and composed of properties that have outstanding value as part of cultural and natural heritage.⁸⁹ Parties to the 1972 UNESCO Convention furnish the World Heritage Committee with inventories of property forming part of their cultural and natural heritage, from which the World Heritage Committee establishes its World Heritage List.⁹⁰ From the list, the World Heritage Committee also establishes a List of World Heritage in Danger, which is a list of property for which

81. *See id.*, art. 2, 1037 U.N.T.S. at 153-54.

82. *See id.* *See generally* Gordon, *supra* note 48, at 543 (discussing difficulty of compiling such an inventory). Gordon recognized that such a project would not only be very expensive, but that it would limit coverage of the 1970 UNESCO Convention to items on the list. *See id.*

83. *See* Gordon, *supra* note 48, at 543.

84. *See id.* at 544.

85. Hague Convention, *supra* note 5, 249 U.N.T.S. at 270.

86. *Id.* art. 12, 249 U.N.T.S. at 277.

87. *See id.* art. 12(2)-(3), 249 U.N.T.S. at 278.

88. 1972 UNESCO Convention, *supra* note 30, art. 8, 1037 U.N.T.S. at 155.

89. *See id.* art. 11(2), 1037 U.N.T.S. at 156.

90. *See id.*

major operations are necessary and for which assistance has been requested.⁹¹

IV. A SEPARATE PROPERTY LAW FOR CULTURAL PROPERTY

Cultural property, both in public and in private ownership, should be recognized as a "special category of property" subject to special property laws. The unique status of cultural property mandates a separate and specific form of regulation. One commentator suggested that cultural property should be included among a nation's natural resources over which permanent sovereignty is claimed.⁹² He noted that the building-up of national registers, the registration of objects of special value, the preparation and publication of lists of stolen property and the computerization of public property and privately owned cultural objects are important tasks that must be administered by public authorities. The 1995 UNIDROIT Convention validates cultural property as a unique type of property subject to distinctive property laws.

Congress did not identify cultural property as a special category of property until 1966, when it enacted the National Historic Preservation Act⁹³ to provide for the maintenance and expansion of a National Register of districts, sites, buildings, structures and objects significant in United States history, architecture, archaeology and culture.⁹⁴ In 1980, Congress later recognized the need to nom-

91. *See id.* art. 11(4), 1034 U.N.T.S. at 156. The list must contain an estimate of the cost of such operations. *See id.* It may include only property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration; large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of land; major alterations due to unknown causes; abandonment; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruption; and changes in water levels, floods and tidal waves. *See id.*

92. *See* Emmanuel Roucounas, Professor at University of Athens, Proceedings of the Thirteenth Colloquy on European Law, Int'l Legal Protection of Cultural Property, Delphi, at 136 (1983).

93. 16 U.S.C. §§ 470a to 470w-6 (1994).

94. *Id.* Properties of historical significance are nominated for listing in the National Register. The criteria applied to evaluate property is set out in 36 C.F.R. § 60.4 (1981). Qualifying property includes buildings, sites and objects:

[T]hat are associated with events that have made a significant contribution to the broad patterns of [United States] history; that are associated with the lives of persons significant in [that history]; or that embody the distinctive characteristics of a type, period, or method of construction . . . that represent the work of a master . . . that possess high artistic values, that represent a significant and distinguishable entity whose components may lack individual distinction, or that have yielded, or may be likely to yield, information important in prehistory or history.

36 C.F.R. § 60.4.

inate properties in the United States that have outstanding universal value to the World Heritage Committee.⁹⁵ The National Park Service compiles and maintains an indicative inventory of cultural and natural properties located within the United States that, based on preliminary examination, appear to qualify for World Heritage status and that may be considered for nomination to the World Heritage List.⁹⁶ Most historical preservation in the United States is accomplished by the states in cooperation with the federal government.

Although there are no laws in the United States limiting either private ownership of cultural objects or the transfer of private lands or buildings with archaeological or historical importance, courts in the United States have permitted the federal government and the states to "take" private historical property. In 1939, the Eighth Circuit Court of Appeals ruled that the federal government could institute condemnation proceedings to acquire private property that the Secretary of the Interior determined possessed exceptional value as a historical site, in order to preserve it for the public

95. See 16 U.S.C. § 470a-1. This was pursuant to United States participation in the 1972 UNESCO Convention.

96. See 36 C.F.R. § 73.1. The Assistant Secretary of the Interior, in cooperation with the Secretary of State, the Smithsonian Institution and the Advisory Council on Historic Preservation, periodically nominates properties that appear to be of outstanding universal value to the World Heritage Committee on behalf of the United States. See *id.* This annual process is begun first by identifying the properties, then following up with nomination and approval of the properties. See *id.* A Federal Register notice is issued to start the process by requesting recommendations from interested private and public sources and includes a list of potential U.S. World Heritage nominations. See *id.* § 73.7. Property owned or controlled by private parties is not included, unless the owner concurs. See *id.*

A monument, group of buildings or site is considered to have outstanding universal value if it:

[R]epresents a unique artistic achievement, a masterpiece of the creative genius; ha[s] exerted great influence, over a span of time or within a cultural area of the world, on developments in architecture, monumental arts or townplanning and landscaping; bear[s] a unique or at least exceptional testimony to a civilization which has disappeared; [is] an outstanding example of a traditional human settlement which is representative of a culture and which has become vulnerable under the impact of irreversible change; or [is] directly or tangibly associated with events or with ideas or beliefs of outstanding universal significance.

Id. § 73.9. Moreover, the property must meet the test of authenticity in design, materials, workmanship or setting. See *id.* Properties nominated for inclusion as natural properties should be "outstanding examples representing the major stages of the earth's evolutionary history," or "significant ongoing geological processes, biological evolution, and man's interaction with his natural environment," or "contain superlative natural phenomena, formations or feature or areas of exceptional natural beauty" or "the foremost natural habitats of threatened species of animals or plants of outstanding universal value." *Id.*

good.⁹⁷ Regulation of the use of such property followed. In 1978, the Supreme Court ruled that New York City, by application of its preservation laws, could refuse to permit an owner of private historical property to alter such property.⁹⁸ In 1988, the Illinois Supreme Court ruled that the National Trust⁹⁹ could maintain a court action to prevent the unlawful destruction of buildings that have national historic significance.¹⁰⁰ Courts in the United States generally have not found preservation regulations to be compensable takings of property.¹⁰¹

Congress first acknowledged a need to protect the cultural property of other nations when it adopted the Pre-Columbian Art Act in 1972.¹⁰² The Act prohibits importation into the United States of any pre-Columbian monumental or architectural sculpture or mural, unless the government of the country of origin issues a certificate stating that exportation of the artifact from that country does not violate any of its laws.¹⁰³ If a pre-Columbian monumental or architectural sculpture or mural is imported into the United

97. See *Barnidge v. United States*, 101 F.2d 295, 296 (8th Cir. 1939).

98. See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 104 (1978).

99. The National Trust was established in 1949 as a private, nonprofit organization to preserve sites, buildings and objects significant in United States history and culture. See 16 U.S.C. § 468 (1994). The affairs of the National Trust are under the direction of a board of trustees composed of the Attorney General of the United States, the Secretary of the Interior, the Director of the National Gallery of Art (Smithsonian Institution) and not less than six United States citizens. See *id.* § 468b.

100. See *Landmarks Preservation Council v. City of Chicago*, 531 N.E.2d 9, 9 (Ill. 1988).

101. See, e.g., *Maier v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975) (application of historical preservation ordinance preventing owner's demolition of building within historic district was not a taking of owner's property); *Mayor of Annapolis v. Anne Arundel County*, 316 A.2d 807 (Md. 1974) (application of city's historical district ordinance, which prevented demolition of city's historic church, was not a taking); *Manhattan Club v. Landmarks Preservation Comm'n*, 273 N.Y.S.2d 848 (N.Y. Sup. Ct. 1966) (landmark designation of former home of Jennie Jerome, Winston Churchill's mother, was not a taking of private property). See also *Mayes v. City of Dallas*, 747 F.2d 323 (5th Cir. 1984) (owner of home, located within historic preservation district, could not change property's exterior features without obtaining prior approval from city). In *Mayes*, the court held that a municipality had "the constitutional power to regulate the use of private property in the interest of historic preservation." *Mayes*, 747 F.2d at 324.

102. 19 U.S.C. §§ 2091-2095 (1994).

103. See *id.* § 2092(a). The Act defines a pre-Columbian monumental or architectural sculpture or mural as any stone carving or wall art, or any fragment or part thereof, which is the product of a pre-Columbian Indian culture or Mexico, Central America, South America or the Caribbean Islands. See *id.* § 2095(3). The stone carving or wall art must have been an immobile monument or architectural structure, or part of such monument or structure, and is subject to export control by the country where the article was first discovered. See *id.*

States in violation of the Act, it may be seized or subject to forfeiture.¹⁰⁴

Congress waited twelve years to adopt the 1970 UNESCO Convention. In 1982, members of Congress noted that the demand for cultural artifacts had resulted in the irremediable destruction of archaeological sites and articles, which consequently deprived the situs countries of their cultural patrimony and important knowledge of their past.¹⁰⁵ Some members of Congress recognized that the United States had become a principal market for articles of archaeological or ethnological interest and of artistic objects, and that in some cases, the discovery of stolen or illegally exported artifacts had severely strained the United States' relations with the countries of origin some of which were close allies of the United States.¹⁰⁶

As a result, in 1982 the United States enacted the Cultural Property Implementation Act¹⁰⁷ to implement the 1970 UNESCO

One of the requirements for allowing a pre-Columbian monumental or architectural sculpture or mural into the United States is a valid certificate. At the time of entry, the importer must have filed a certificate stating that the export does not violate any laws of the country where the piece was first discovered. *See* 19 C.F.R. § 12.107. If the importer does not have a certificate from the government of the country of origin at the time of making entry, the director of customs will store the sculpture or mural and permit the importer ninety days to produce such a certificate. *See id.* § 12.109. If the importer fails to do so, the sculpture or mural is forfeited to the United States. *See id.* If the country of origin presents a request in writing, the director of customs will return the sculpture or mural to that country. *See id.*

104. *See* 19 U.S.C. § 2093.

105. *See* Implementing Legislation for the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, tit. II, 4 U.S.C.C.A.N. 4098, 4100 (1982).

106. *See id.*

107. Convention on Cultural Property Implementation Act, 19 U.S.C. § 2601-2613 (1994). The Act provides that when a participating nation makes a request to the United States for import restrictions on cultural property from that nation, because the requesting nation contends the cultural patrimony of the nation is in jeopardy from the pillage of its cultural properties, the President may enter into a bilateral agreement with that nation to apply import restrictions. *See id.* § 2602. The import restrictions would provide that no designated archaeological or ethnological material exported from the requesting nation could be imported into the United States, unless the requesting nation issued a certificate that the exportation did not violate the nation's laws. *See id.* § 2606. No article of cultural property documented as appertaining to the inventory of a museum or a religious or secular public monument in any nation, that has been stolen from that nation or from an institution, can be imported into the United States. *See id.* § 2607. Any designated archaeological or ethnological material or article of cultural property that is imported into the United States is subject to seizure and forfeiture if it violates any provision of this act. *See id.* § 2609.

The term "archaeological material" refers to an object "of cultural significance [that] is at least 250 years old and has been normally discovered as a result of

Convention into domestic law.¹⁰⁸ The U.S. Senate approved the 1972 UNESCO Convention in 1973, but implementing legislation for U.S. participation in the 1972 UNESCO Convention was not enacted until 1980.¹⁰⁹ Although the United States still is not a signatory to the Hague Convention, armed forces of the United States do follow and receive training on its provisions.

Congress gave formal recognition to the concept of the restitution of cultural objects when it enacted the Native American Graves Protection and Repatriation Act.¹¹⁰ Native Americans view their culture as separate and unique, and have insisted that their special heritage should be identified and set apart from the historical heritage of the United States generally. Native Americans have asserted an ownership in, and have demanded repatriation of, Native Ameri-

scientific excavation, clandestine or accidental digging, or exploration on land or under water." *Id.* § 2601. The term "object of ethnological interest" refers to an object that is "the product of a tribal or nonindustrial society and [is] important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origin, development, or history of that people." *Id.*

108. 19 U.S.C. § 2611. The Convention on Cultural Property Implementation Act is not applicable to any designated archaeological, ethnological or any other article of cultural property imported into the United States, if such material or article has been held in the United States for a period of not less than three consecutive years, by a recognized museum and was purchased by the museum for value, in good faith, and without notice that such material or articles were imported in violation of the Act, but only if:

- (1) the acquisition of such material or article has been reported in a publication of such institution, any regularly published newspaper or periodical with a circulation of at least fifty thousand, or a periodical or exhibition catalog which is concerned with the type of article or materials sought to be exempted from this title,
- (2) such material or article has been exhibited to the public for a period or periods aggregating at least one year during such three-year period or
- (3) such article or material has been cataloged and the catalog material made available upon request to the public for at least two years during such three-year period.

Id. § 2611(2)(A).

Furthermore, the Act does not apply to any material or articles that have been in the United States for ten years or more and have been exhibited in a recognized United States museum for five years or more. *See id.* § 2611(2)(B). The Act does not apply to material and articles that have been in the United States less than ten consecutive years; it does apply when the country concerned has received or should have received during that period fair notice of location of the material or articles within the United States. *See id.* § 2611(2)(C). The Act is not applicable to material and articles that have been in the United States for at least twenty consecutive years, if the claimant can show that they purchased the material or article without realizing that it was imported illegally. *See id.* § 2611(2)(D).

109. *See* H.R. REP. NO. 96-1457, at 6406 (1980). The legislation was part of the 1980 amendments to the National Historic Preservation Act. *See* 16 U.S.C. § 470a-1 (1994).

110. 25 U.S.C. §§ 3001-3013 (1994).

can artifacts. In 1991, Native Americans obtained the legislation necessary to secure their religious and funerary objects when Congress enacted the Native American Graves Protection and Repatriation Act. The Act requires federal agencies and museums, receiving federal funds and possessing collections of Native American human remains and associated funerary objects, to compile an inventory of these items and, if possible, to identify the geographical and cultural affiliation of such items.¹¹¹ If the agency or museum determines that Native American human remains and associated objects belong to a certain tribe, then, upon the tribe's request, the remains must be returned.¹¹²

Congress has not yet taken a formal position on the UNIDROIT Convention. Although Congress was amenable to enacting legislation to recognize and preserve a distinct Native American culture, considering Congress' procrastination in implementing the UNESCO Conventions, it seems unlikely that it will enact the UNIDROIT Convention in the near future.

Courts in the United States have provided effective judicial remedies to foreign governments and citizens seeking to recover stolen (but not illegally exported) cultural property.¹¹³ The common law, the English *nemo dat* rule (which contrasts with most civil law states), provides that one who purchases property from a thief, no matter how innocently, acquires no title in the property. Title remains with the true owner.¹¹⁴

111. See *id.* § 3003(a). Museums were required to complete the inventories in consultation with tribal governments, Native Hawaiian organization officials and traditional religious leaders by 1995. See *id.* § 3003(b). Specifically, they had to supply documentation of existing records for the purpose of determining the geographical origin, cultural affiliation and basic facts surrounding the acquisition and accession of Native American human remains and associated funerary objects. See *id.*

112. See *id.* § 3005(a)(1). The Act provides that a museum will not be liable for claims from an aggrieved party for breach of fiduciary duty or good faith if the museum repatriates in good faith. See *id.* § 3005(f).

113. See, e.g., *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts*, 917 F.2d 278, 280, (7th Cir. 1990). In *Goldberg*, the court applied Indiana law to determine the right of possession of four Byzantine mosaics created in the early sixth century, as between the Church of Cyprus, the Republic of Cyprus and the purchaser of the mosaics. *Id.* at 284. The court determined that because the mosaics were stolen from the rightful owner (the Church of Cyprus), the purchaser of the mosaics never obtained title to, or right to possession of, the mosaics. See *id.* at 290-91, 294. The court held that the plaintiff's cause of action did not accrue until the plaintiffs, using due diligence, knew or were on reasonable notice of the identity of the possessor of the mosaics. See *id.* at 288. The court concluded that the plaintiffs exercised due diligence in their search to locate and recover the mosaics. See *id.* at 293-94.

114. See *Menzel v. List*, 267 N.Y.S.2d 804, 819 (N.Y. Sup. Ct. 1966). The New York court stated that the "principle has been basic in the law that a thief conveys

While courts have recognized that a seller cannot convey good title to once-stolen property, some courts in the United States imposed a due diligence requirement upon original owners.¹¹⁵ The imposition of a due diligence requirement for original owners contrasts with provisions of the UNIDROIT Convention.

The UNIDROIT Convention mandates the return of a stolen cultural object to the original owner.¹¹⁶ Further, any cultural object that has been excavated unlawfully, or excavated lawfully but retained unlawfully, is deemed to be stolen.¹¹⁷ In addition, a party nation to the UNIDROIT Convention may demand that a court of another party country to the convention order the return of a cultural object illegally exported from the territory of the requesting nation.¹¹⁸

no title as against the true owner." *Id.* The court commented that the law "stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors." *Id.* at 820.

When the "true owner" is a nation, a question may arise as to priority between a country from which an artifact was removed and the country of origin. The return of an object may be to the country whose citizens include the cultural descendants of those who made or created the object. It could be the country whose territory included the original site or sites from which the artifact was last removed.

115. See *O'Keeffe v. Snyder*, 416 A.2d 862, 870 (N.J. 1980). In *O'Keeffe*, the court held that the statute of limitations on a suit to recover stolen paintings would begin to run when the true owner "discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action." *Id.* at 869. But see *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982) (where court refused to impose a due diligence requirement upon true owner). In *Elicofon*, the court ordered two priceless Albrecht Durer portraits, created around 1499 and stolen from a castle located in Germany in 1945, returned to the owner. *Id.* at 1165. The possessor, an American citizen, purchased the paintings in good faith 20 years earlier. See *id.* at 1152-53. The purchaser was concerned that a bona fide purchaser had to wait for a demand from the true owner before the statute of limitations would begin to run. See *id.* at 1163-65. In *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430 (N.Y. 1991), the highest court in New York ruled that New York does not impose a due diligence requirement upon original owners of property.

116. UNIDROIT Convention, *supra* note 7, art. 3(1), 34 I.L.M. at 1331. The UNIDROIT Convention does not require that a theft be proven. See *id.* art. 3(2).

117. See *id.* art. 3(2), 34 I.L.M. at 1331.

118. See *id.* art. 5(1), 34 I.L.M. at 1332. Illegal exportation occurs when cultural objects temporarily exported under a permit for exhibition, research or restoration are not returned in accordance with the permit. See *id.* art. 5(2), 34 I.L.M. at 1333.

The court of the country addressed must order the return of an illegally exported cultural object if the requesting nation:

[E]stablishes that removal of the object from its territory significantly impairs the physical preservation of the object or of its context, the integrity of a complex object, the preservation of information of a scientific or historical character, the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting state.

Id. art. 5(3), 34 I.L.M. at 1333.

Although the UNIDROIT Convention provides time limits on claims for restitution, it does not require claimants to exercise due diligence.¹¹⁹ An aggrieved party has three years to bring a claim of restitution. This time period starts running from the time the claimant knew of the location and the possessor of the cultural object.¹²⁰ However, any cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, is not subject to time limitations other than the three year limitation period from the time when the claimant knew the location and possessor of the cultural object.¹²¹ Regardless of the previous provision, nations may establish their own time limits of seventy-five years or more.¹²²

The UNIDROIT Convention exempts public collections from all time limitations other than the three-year limitation period. Public collections include inventoried or otherwise identified cultural objects owned by religious institutions and other cultural, educational or scientific institutions that are recognized by a nation as serving the public interest.¹²³ While such property generally is not considered public property, special public protection for cultural property located in private institutions is needed as well.

Some courts in the United States have expressed concern about protecting innocent purchasers when the original owner has not exercised due diligence to recover stolen property.¹²⁴ Thus, with the exception of New York, United States courts have ruled that the statute of limitations on suits to recover stolen property begins to run when the true owner knew or reasonably should have

119. *Id.* art. 3, 34 I.L.M. at 1331.

120. *See id.* art. 3(3), 34 I.L.M. at 1331.

121. *See* UNIDROIT Convention, *supra* note 7, art. 3(4), 34 I.L.M. at 1331.

122. *See id.* art. 3(5), 34 I.L.M. at 1331. The UNIDROIT Convention states that a contracting state may declare that a claim for reparation of a cultural object stolen from a monument, archaeological site or public collection is limited to 75 years or such longer period as provided by law. *See id.*

123. *See id.* art. 3(7), 34 I.L.M. at 1332. Claims for "restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community as part of a community's traditional or ritual use, are also subject to the time limitations applicable to public collections." *Id.* art. 3(8), 34 I.L.M. at 1332.

124. *See O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980). In *O'Keeffe*, the court decided that it should protect an innocent purchaser from an owner who "sleeps on his rights." *Id.* at 875. The court further noted that apart from the discovery rule, the statute of limitations in replevin actions ordinarily runs against the owner of lost or stolen property from the time of the wrongful taking. *See id.* at 872. However, as the court stated, this was ordinarily true "absent fraud or concealment." *Id.* According to the court, where a chattel is fraudulently concealed, the general rule is that the statute is tolled. *See id.* at 872-73.

known of the cause of action and the identity of the possessor of the property.¹²⁵

In New York, limitations on the time during which suit may be brought to recover stolen property does not begin until the rightful owner asserts a claim to the property and the possessor refuses to return the property.¹²⁶ Courts in New York have determined that this rule is better than the discovery rule applicable in other states, because it gives the owner greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser.¹²⁷

The notion of an innocent purchaser is relevant under the UNIDROIT Convention only with respect to the issue of whether a current possessor of stolen or illegally exported cultural objects is entitled to compensation. The UNIDROIT Convention provides

125. *See id.* at 874. The New Jersey statute of limitations, which was at issue in *O'Keeffe*, provided that a suit for recovery of goods must be commenced within six years after the cause of action accrues. *See* N.J. STAT. ANN. § 2A:14-1 (West 1997). According to the court in *O'Keeffe*, this discovery rule avoids the harsh result of a mechanical application of the limitations statute. *O'Keeffe*, 416 A.2d at 869.

126. *See* *Hoelzer v. City of Stamford*, 933 F.2d 1131, 1138 (2d Cir. 1991); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991). In *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 146 (N.Y. App. Div. 1990), the New York Appellate Division recognized under New York law that the statute of limitations does not begin to run as against a true owner until a demand for a return on the property was made and refused. *Id.* The court ruled that absent a demand for the property, there is no cause of action against a bona fide purchaser and absent a cause of action, the statute of limitation does not begin to run. *See id.* at 147.

127. *See* *Guggenheim*, 569 N.E.2d at 431. In *Guggenheim*, the court did state, however, that an owner's failure to exercise reasonable diligence to locate a stolen artwork would be considered in the context of the defense of laches. *Id.*

The court referred to the discovery rule in other states, where the statute of limitations in suits to recover works of art that had been stolen begins to run from the time the true owner discovers or should have discovered the whereabouts of the stolen art. *See id.* at 430. It explained that New York rejected the discovery rule because New York courts decided the rule did not provide a reasonable opportunity for individuals of foreign governments to receive notice of a possessor's acquisition of artwork and sufficient time to take action to recover a work. *See id.* The court was concerned that New York would become a "haven for cultural property stolen abroad" because such works would be immune from recovery under limited time periods. *Id.* The court concluded it was inappropriate to shift the burden to the wronged owner. *See id.*

In *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 45 (S.D.N.Y. 1990), the Republic of Turkey sought recovery of artifacts in possession of the Metropolitan Museum of Art. The Republic of Turkey contended that the artifacts were excavated from burial grounds in the Ushak region of Turkey and exported to the United States in contravention of Turkish law; it also claimed that all artifacts found in Turkey belong to the Republic of Turkey. *See id.* The New York court held that "unreasonable delay" requirements apply only to the equitable defense of laches. *Id.* at 46. The court ruled that the statute of limitations had not run on Turkey's cause of action against the Metropolitan Museum of Art. *See id.* at 47.

for compensation to a possessor of a stolen cultural object who is required to return the object, if the possessor neither knew nor reasonably should have known that the object was stolen and can prove that he or she exercised due diligence when acquiring the object.¹²⁸ Thus, while the UNIDROIT Convention does not impose due diligence upon a claimant of cultural property, it does impose a due diligence requirement upon a bona fide possessor who seeks compensation after being required to return a cultural object. In determining whether a possessor exercised due diligence, the UNIDROIT Convention requires courts to consider the character of the parties, the price paid, whether the possessor consulted any register of stolen cultural objects or any other relevant information or documentation that it reasonably could have obtained, and whether the possessor consulted accessible agencies or took any other steps that a reasonable person would have taken in the circumstances.¹²⁹ In determining whether a possessor knew or should have known that a cultural object had been exported illegally, the absence of an export certificate required under the law of the requesting nation must be considered.¹³⁰

In *Porter v. Wertz*,¹³¹ the New York State Attorney General asked the New York Court of Appeals to rule that it was a departure from reasonable commercial standards for the purchaser of a valuable painting to fail to inquire about title to the painting or to question the credentials of the seller as an art dealer. According to the State Attorney General, good faith among art merchants requires an inquiry as to ownership of an object d'art.¹³² The Art Dealers Association of America, on the other hand, contended that such a rule of law would cripple the art market.¹³³ The court in *Wertz* declined to rule on the good faith question.¹³⁴ Later, however, in *Autocephalous Greek-Orthodox Church v. Goldberg*,¹³⁵ the Court of Appeals for the Seventh Circuit suggested that a purchaser should conduct a formal search of records from the International Foundation for Art Re-

128. See UNIDROIT Convention, *supra* note 7, art. 4(1), 34 I.L.M. at 1332. Also, reasonable efforts must be made "to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the state in which the claim was brought." *Id.* art. 4(2), 34 I.L.M. at 1332.

129. *Id.* art. 4(4), 34 I.L.M. at 1332.

130. See *id.* art. 6(2), 34 I.L.M. at 1333.

131. 421 N.E.2d 500, 502 (N.Y. 1981).

132. See *id.*

133. See *id.*

134. See *id.*

135. 917 F.2d 278, 294 (7th Cir. 1990).

search (IFAR) and a full background search of the seller and the seller's claim of title.

Based upon the recommendation of the court in *Autocephalous* that purchasers of artworks or of historical properties contact certain organizations¹³⁶ to determine if an artwork or artifact is listed as stolen property, and considering the provision of the UNIDROIT Convention which provides that one of the factors in determining due diligence of a possessor is whether the possessor consulted any reasonably accessible register of stolen cultural objects and any other relevant information and documentation that the possessor reasonably could have obtained, it may become more difficult for a possessor to prove good faith. Courts now may conclude that a person is not an innocent purchaser if a possessor fails to conduct an adequate search of an artifact's provenance. Indeed, the value and importance of cultural property should grant such property a separate status in the law that would mandate such a search by a potential purchaser.

If a government asserts title to artifacts located within its boundaries, courts in the United States also may apply the National Stolen Property Act to the theft of such artifacts, even though the artifacts may not have been possessed physically by agents of the nation. In *United States v. McClain*,¹³⁷ the Court of Appeals for the Fifth Circuit upheld a conviction under the National Stolen Property Act of individuals who sold pre-Columbian artifacts in Texas. The court determined that there was clear Mexican ownership of the artifacts.¹³⁸

136. Such organizations include the following: Art Loss Register, International Criminal Police Organization (INTERPOL), which is a group of police agencies that computerize information on stolen artifacts; International Foundation for Art Research (IFAR), which monitors trafficking in stolen art; International Council of Museums and Sites, which coordinates and develops measures and security systems for museums throughout the world; Europa Nostra, which is a European organization interested in the conservation of the architectural heritage of Europe; Christie's; Sotheby's; FBI, which maintains a central archive of stolen art in the United States; Harvard University's Dumbarton Oaks Institute for Byzantine Studies, which is the leading center in the United States for the study of Byzantine Art; and Art Dealers' Association of America.

137. 593 F.2d 658, 660 (5th Cir. 1979).

138. See *id.* at 671. But cf. *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989) (asserting that because Peruvian government could not indicate countries where Pre-Columbian artifacts were found or exported from, and because extent of Peru's claim of ownership was uncertain, it had not sufficiently stated claim of ownership to artifacts). In *Johnson*, the court decided that Peru had not sufficiently stated a claim of ownership to Pre-Columbian artifacts it claimed were excavated from historical monuments in Peru. *Id.* at 812. The court ruled against Peru because evidence was uncertain in which country the artifacts were found and from which they were exported. See *id.* In addition, "it determined that

V. INTERNATIONAL EXCHANGE OF CULTURAL TREASURES

A sharing of each nation's cultural treasures is a feasible and vital alternative to the tacit approval given in the past to powerful nations looting and pilfering the artifacts of smaller, vulnerable countries. The sharing of cultural property through loans or traveling exhibits is a means of increasing knowledge and goodwill among the countries involved. In the past, international loans of cultural treasures were hindered by the cost of insuring such exhibitions. In 1978, in its Protection of Movable Cultural Property,¹³⁹ UNESCO officially recognized the increasing number of cultural exchanges and the positive role such exchanges play in meeting the growing desire of the public to know and appreciate the wealth of the cultural heritage of humanity.¹⁴⁰ It also acknowledged that such exchanges lead to an increase in dangers to which cultural property is exposed. Since insurance is beyond the means of most museums and other institutions and impedes the organization of international exhibitions and other exchanges between different countries,¹⁴¹ UNESCO recommended that museums and other institutions reduce the cost of risk coverage through the national management of insurance contracts or by full or partial governmental guarantees.¹⁴²

To solve the funding problem of acquiring international exhibitions on loan, Congress enacted the Arts and Artifacts Indemnity Act in 1975.¹⁴³ The Act provides indemnification by the federal government for museum exhibitions of works of art, including tap-

the extent of Peru's claim of ownership as part of its domestic law was uncertain." *Id.* at 815.

In *Republic of Turkey v. OKS Partners*, 797 F. Supp. 64, 66 (D. Mass. 1992), the Republic of Turkey brought suit against the possessor of ancient Greek and Lycian silver coins, which the Republic of Turkey maintained were unearthed in Turkey. The Republic of Turkey maintained that the sale of such coins could be in violation of the National Stolen Properties Act. *See id.* at 66-67. The Republic of Turkey declared that under Turkish law, all artifacts within Turkey's borders are Turkish property even before they are discovered. *See id.* at 66. The court ruled that the statute of limitations did not bar Turkey's claim. *See id.* at 69-70. The court stated that the discovery rule applied and that facts giving rise to a cause of action were "inherently unknowable" to the Republic of Turkey, for the purpose of tolling the statute of limitations under either the discovery rule or the doctrine of fraudulent concealment. *See id.*

139. *See* UNESCO RECOMMENDATION FOR THE PROTECTION OF MOVABLE CULTURAL PROPERTY OF 1978, 1 UNESCO THE PROTECTION OF MOVABLE CULTURAL PROPERTY: COMPENDIUM OF LEGISLATIVE TEXTS (1984).

140. *Id.* Preamble.

141. *See id.*

142. *See id.* art. 10.

143. 20 U.S.C. §§ 971-977 (1994).

estries, paintings, sculptures, folk art, graphics and craft arts, manuscripts, rare documents and books, photographs, motion pictures, audio and video tapes, and other objects or artifacts that are of educational, cultural, or scientific value and that are certified by the Secretary of State as being in the national interest.¹⁴⁴ The Arts and Artifacts Indemnity Act has provided the means to accomplish the objective of permitting United States citizens to share in the cultural treasures of the world. It has fostered international cooperation and goodwill through the sharing of cultural property.

VI. CONCLUSION

Recognition of the universal value of cultural property demands its preservation. All countries must acknowledge their obligation to enact sufficient legislation to provide such protection. These laws should be founded on the principle that cultural treasures of universal value must be maintained and preserved in their original environment. Thus, countries should also address the need for, and the means to accomplish, the international restitution of those special cultural treasures that have universal value. In addition, wealthier nations must provide aid to less developed countries to assist them in the preservation of their national cultural heritage, for the cultural heritage of each nation belongs not only to that nation but also to the world.

Finally, all nations should accede to the UNIDROIT Convention. International agreement based upon the principles set out in the UNIDROIT Convention would confirm the special status of cultural property and, hopefully, would provide the additional impetus currently needed for adequate international cooperation in the preservation and protection of the world's cultural treasures.

144. *See id.* § 972(a). An indemnity agreement under the Act covers all eligible items while they are on exhibition in the United States, when the display is part of an exchange of exhibitions. *See id.* § 972(b)(1). The Act is administered by the Federal Council on the Arts and Humanities (Council). Applications for indemnity are submitted to this council. *See id.* § 971(a). Furthermore, indemnification is limited to \$300 million for a single exhibition. *See id.* § 974(c). No more than \$3 billion of indemnity can be outstanding at any one time. *See id.* § 974(b). Any person, nonprofit agency, institution, or government can apply for an indemnity agreement. *See id.* § 973(a). The application must describe each item to be covered by the agreement, including an estimated value of the item, and "set forth policies, procedures, techniques, and methods with respect to preparation for, and conduct of, exhibition of the items, and any transportation related to the items." *Id.* § 973(b). If the council approves, an agreement is made between the Council and the "applicant pledging the full faith and credit of the United States to pay any amount for which the Council becomes liable under [the] agreement." *Id.* § 973(c).

